U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF TPSE- LLC

DATE: SEPT. 12, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a geological technology testing company, seeks classification of the Beneficiary as an individual of exceptional ability in the sciences. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is normally attached to this immigrant classification. *See* § 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director, Texas Service Center, denied the petition. The Director found that the Beneficiary did not qualify for classification as an individual of exceptional ability, and therefore declined to make a determination as to whether a waiver of a job offer would be in the national interest.

The matter is now before us on appeal. In a letter provided on appeal, the Petitioner argues that the Beneficiary qualifies as an individual of exceptional ability.

Upon *de novo* review, we will dismiss the appeal.

## I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate the beneficiary's qualification for the underlying visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification normally requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> > (i) National interest waiver. . . . the Attorney General[1] may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2). Furthermore, with regard to eligibility for the national interest wavier, neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

*Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

## II. ANALYSIS

Part 6 of the Form I-140, Immigrant Petition for Alien Worker, listed the Beneficiary's job title as "Scientific Technologist" and indicated that he prepares "thin sections of rocks by gluing a domino sized epoxy impregnated rock sample to a slide, cutting and grinding it." The Form I-140 was accompanied by letters of support discussing the Beneficiary's expertise in preparing such thin section rock specimens for clients in the petroleum industry and academia. In addition, the Petitioner provided the Beneficiary's résumé, training course certificates, and Forms W-2, Wage and Tax Statements. The Director issued a request for evidence (RFE) asking the Petitioner to submit documentation that meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), and that satisfies the second and third prongs of the *NYSDOT* national interest analysis. The Petitioner's response included the Beneficiary's membership renewal confirmation from the additional letters of support, the Beneficiary's federal income tax returns, salary data, information concerning U.S. energy policy, and copies of previously submitted documents.

The Director denied the petition, finding that the Beneficiary did not qualify for classification as an individual of exceptional ability. As the Petitioner had not established the Beneficiary's eligibility for the underlying classification, the Director did not make a determination as to whether a waiver of a job offer would be in the national interest. On appeal, the Petitioner claims that the Beneficiary meets the following three exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii), as detailed below:

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Petitioner submits the Beneficiary's pay statements and "unionized work place cards" from reflecting his employment there from May 2006 through June 2007. The Petitioner also offers a letter from a former petrophysics laboratory supervisor at indicating that the Beneficiary worked for the company as a thin section preparation technician "from late 2006 to August 2007." In addition, the Petitioner provides a letter and Forms W-2 for the Beneficiary reflecting that it has employed him as a thin section preparation technician since August 2007. According to the submitted documents, the Beneficiary had only eight years and five months of full-time experience in his occupation at the time of filing the Form I-140 petition on October 15, 2014. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). With regard to the Beneficiary's full-time work for the Petitioner after October 15, 2014, we cannot consider any occupational experience gained after the date the petition was filed as evidence to establish his eligibility at the time of filing. While the Petitioner has documented the Beneficiary's work experience as a thin section preparation technician since May 2006, the Beneficiary had not accrued the requisite ten years of full-time experience in the occupation at the time of filing the Form I-140. Therefore, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

The Petitioner provides Forms W-2 and income tax returns for the Beneficiary showing earnings of $143,358.42 in 2014, $123,937.42 in 2013, $77,063.18 in 2012, $90,585.55 in 2011, $82,277.25 in 2010, $60,961.41 in 2009, $54,896.08 in 2008, and $15,138.62 in 2007. In addition, the Petitioner submits an April 2014 article from the reflecting that in 2013 the average salary for a petroleum geologist was $145,400 with "6-9" years of experience and $147,600 with "10-14" years of experience. The article also includes "Historical Averages Salary" data reflecting:

| Years Experience | 2010 | 2011 | 2012 | 2013 |
|---|---|---|---|---|
| 6-9 | $127,800 | $137,300 | $127,800 | $145,400 |
| 10-14 | $139,100 | $153,400 | $147,000 | $147,500 |

While the Petitioner offers salary data for a petroleum geologist, there is no evidence demonstrating that the Beneficiary works in that occupation or that a thin section preparation technician is a petroleum geologist. Regardless, the submitted information indicates that the Beneficiary's salary did not exceed the average amount for a petroleum geologist in any specific year. Accordingly, even if we concluded that the Beneficiary is a petroleum geologist, the Petitioner has not established that his salary demonstrates exceptional ability.

The Petitioner also offers results from a search utilizing an online search engine for job postings, that identify two laboratory technician jobs in Texas. The two jobs listed

on [redacted] are for technicians with experience in biostratigraphy and micropaleontology. The webpage states that "technician salaries in [redacted] TX" average "$45,245 per year" and are "2.4% lower than national average." The webpage further mentions that the aforementioned salary data is "based on 275 employees and 161 jobs," but there is no indication as to whether the information relates solely to job openings or if it also includes data from technician jobs that are not vacant.

In addition, the Petitioner provides search results from [redacted] stating that the "average salary for thin section technician jobs is $39,000." The [redacted] webpage notes that its salary information "was calculated using the average salary for all jobs with the term 'thin section technician.'" The Petitioner has not shown that the [redacted] and [redacted] search engines' populations of job offerings represent appropriate bases for comparison as there is no indication that their average salary calculations included technician jobs with a substantial level of experience. Regardless, the Petitioner must submit evidence showing that the Beneficiary has commanded a salary that demonstrates exceptional ability, and not just a salary that is above average for his occupation. For the reasons outlined above, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

*Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E)

The Petitioner submitted a June 2015 purchase confirmation receipt from the [redacted] reflecting the Beneficiary's membership renewal. In addition, the Petitioner's appellate submission includes a webpage from the [redacted] listing the Beneficiary's account information and indicating that his associate membership was approved "11/1/2014." There is no evidence demonstrating that the Beneficiary was a member of the [redacted] at the time of filing the Form I-140 petition on October 15, 2014. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, we cannot consider any professional memberships that commenced after the petition was filed as evidence to establish the Beneficiary's eligibility at the time of filing. Therefore, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

*Summary*

The record supports the Director's finding that the Beneficiary did not meet at least three of the six regulatory criteria for exceptional ability. The Director added that, because the Petitioner had not established the Beneficiary's eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. The waiver is available only to foreign workers who otherwise qualify for classification under section 203(b)(2)(A) of the Act.

On appeal, the Petitioner questions the applicability of *NYSDOT* to the present matter. The Petitioner states that it is seeking "the immigration classification" based on the Beneficiary's "performance in the actual commission of the profession at a high since 2007 level," and that "it is not simply an issue of a shortage of workers." The Petitioner contends that the Beneficiary "has a talent and skill that few possess" and his "ability directly supports efforts by US Exploration and Production

companies to find and produce a natural resource that has been identified as important to the Nation's security."

*NYSDOT* provides the analytical framework for USCIS to determine if a waiver of the job offer is in the national interest. With regard to following the guidelines set forth in *NYSDOT*, the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act, and as the Petitioner seeks a national interest waiver on behalf of the Beneficiary, *NYSDOT* is applicable. As previously outlined, the Beneficiary must first qualify for the underlying classification before we determine if a waiver of a job offer is in the national interest. In other words, the Petitioner must show that the Beneficiary is either an advanced degree professional or possesses exceptional ability before we reach the question of the national interest waiver. The Petitioner does not claim that the Beneficiary is an advanced degree professional, and as previously discussed, has not shown that the Beneficiary meets at least three of the regulatory criteria that would establish him as an alien of exceptional ability.

On appeal, the Petitioner explains how the Beneficiary's work benefits the United States, and thereby serves the national interest. The Petitioner resubmits letters of support discussing the Beneficiary's technical skills and importance to his employer and its clients, but they do not provide specific examples of how the Beneficiary's work has influenced the field as a whole. *See NYSDOT*, 22 I&N Dec. at 219, n.6. Regardless, as the Director made no initial determination regarding the national interest waiver, and because we agree with the Director's finding concerning the Beneficiary's ineligibility for the underlying classification as an individual of exceptional ability, a *de novo* determination regarding the national interest waiver claim would not change the outcome of the appeal and, therefore, would serve no constructive purpose. The Beneficiary cannot qualify for the waiver without first qualifying for the underlying classification.

## III. CONCLUSION

The Beneficiary has not satisfied at least three of the regulatory criteria specified at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, the Petitioner has not established that the Beneficiary qualifies for classification as an individual of exceptional ability under section 203(b)(2)(A) of the Act. The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of TPSE- LLC*, ID# 18001 (AAO Sept. 12, 2016)